IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 23562-9-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
W.A., JR.,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

SCHULTHEIS, J. —On June 7, 2004, W.A., Jr., received a telephone call from his girl friend. She told W.A. that G.H., a boy at her school, tattooed her name on his leg and was saying bad things about W.A. W.A. later met his girl friend after school at her bus stop at 7th and Moraine in Kennewick, Washington. G.H. exited the bus with T.S. and began to walk down the street. W.A. called out to G.H., asking him to stop. As he approached G.H., W.A. pulled a knife from his waistband and held it to G.H.'s side. W.A. threatened to stab G.H. if he kept talking about W.A. Meanwhile, W.A.'s girl friend called to him from approximately a block away, urging him to leave G.H. alone. The girl friend was afraid W.A. would hurt G.H. The girl friend was not in a position to see whether

W.A. had a knife. T.S. was standing beside G.H. during the incident and could clearly observe what transpired. As G.H. turned to leave, W.A. hit him in the back of the head.

W.A. was charged with second degree assault. At his juvenile adjudication hearing, he presented three witnesses—his girl friend, his girl friend's younger brother, and his grandfather—each of whom testified that they did not see a knife when W.A. confronted G.H. W.A. was adjudicated guilty. The juvenile court commissioner entered findings of fact and conclusions of law. A standard range detention was ordered. W.A. appeals.

DISCUSSION

a. Evidence Sufficiency

When reviewing the sufficiency of the evidence to support a juvenile adjudication, we view the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Ware*, 111 Wn. App. 738, 741, 46 P.3d 280 (2002). The elements of the crime may be established by either direct or circumstantial evidence; one type of evidence is of no less value than the other. *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202 (1977); *see State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

We review challenged findings of fact to see if they are supported by substantial

evidence. *State v. Avila*, 102 Wn. App. 882, 896, 10 P.3d 486 (2000). We defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the evidence. *State v. Hayes*, 81 Wn. App. 425, 430, 914 P.2d 788 (1996). The appellate court does not reweigh the evidence or reevaluate the credibility of witnesses. *State v. Bunch*, 2 Wn. App. 189, 191, 467 P.2d 212 (1970) (citing *State v. Hoffman*, 64 Wn.2d 445, 392 P.2d 237 (1964)).

In order to prove the elements of second degree assault as defined by RCW 9A.36.021(1)(c), the State was required to prove that W.A., under circumstances not amounting to assault in the first degree, assaulted G.H. with a deadly weapon. W.A. only argues that the evidence was insufficient to support the conviction because the testimony of G.H. and T.S. concerning the presence of the knife was inconsistent on critical details and therefore the testimony was not credible. The details cited by W.A. concern the distance between W.A. and G.H. when the knife was displayed, the color of the knife blade, and G.H. and T.S.'s true feelings for W.A.'s girl friend. The trial judge had an opportunity to weigh the testimony, assess the witnesses' credibility, and determine the value of the evidence. The appellate court will not invade these matters that are squarely within the trial judge's province as a trier of fact. *State v. Gilcrease*, 63 Wn.2d 731, 732, 388 P.2d 962 (1964).

W.A. attempted to contest numerous findings of fact. He did not, however,

properly assign error to any of the trial court's findings of fact. "A party must assign error to a finding of fact for it to be considered on review." *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). RAP 10.3(g) also requires:

> A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

W.A. also failed to provide argument to support his objection to the factual findings. *See* RAP 10.3; *In re Disciplinary Proceeding Against Haskell*, 136 Wn.2d 300, 311, 962 P.2d 813 (1998) ("It is incumbent on counsel for the appellant to present argument to the court why specific findings of fact 'are not supported by the evidence and to cite to the record to support that argument'") (quoting *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998)). Even if these objections are construed as assignments of error, the failure to provide argument constitutes waiver. *Goodman*, 150 Wn.2d at 782. Further, the challenge would not avail W.A. We are satisfied that the findings are amply supported by substantial evidence.

b. Prosecutorial Misconduct

We typically review trial court rulings based on allegations of prosecutorial misconduct for abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). The defendant generally has the burden of establishing prosecutorial misconduct

by showing the impropriety of the prosecutor's conduct and its prejudicial effect. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). "To establish prejudice, the defense must demonstrate there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). When, as here, the defendant fails to object to allegedly improper conduct, the argument "is considered waived unless the remark is 'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" *Finch*, 137 Wn.2d at 839 (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) and citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)). We review a prosecutor's allegedly improper remarks in the context of the total argument, the issues in the case, and the evidence addressed in the argument. *State v. Souther*, 100 Wn. App. 701, 714-15, 998 P.2d 350 (2000); *State v. Barrow*, 60 Wn. App. 869, 877, 809 P.2d 209 (1991).

In his closing, the prosecutor argued that G.H. and T.S. could be believed because they had no criminal history. Then he argued that "[G.H. and T.S.] have been threatened. Well, we don't have that testimony before us." Report of Proceedings at 105. The defense did not object to either remark.

As to the first remark, W.A. argues that the State did not produce any evidence regarding the criminal history of either G.H. or T.S. upon which to base the comments

concerning the witnesses' credibility. Next, W.A. claims the prosecutor improperly implied that W.A. threatened G.H. and T.S. in an effort to prevent them from testifying at trial.

W.A. has a difficult burden to show incurable prejudice here due to the presumption that the judge hearing the bench trial will disregard inadmissible matters when making findings. *See State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970). But he does not even claim that the comments were so flagrant and ill intentioned that they caused an enduring prejudice. Nor does he attempt to show a substantial likelihood that the prosecutor's comments affected the verdict. In the absence of these showings, he waived his claim of error. Moreover, with respect to the second remark, the prosecutor contemporaneously corrected himself and made clear that there was no evidence concerning a threat.

The conviction is affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Schultheis, J.

WE CONCUR:

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Sweeney, C.J.

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Kato, J.